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No. 97-241

In The

Supreme Court of the United States

October Term, 1997

ZOLLO DRUM COMPANY, INC. and
NRS CARTING COMPANY, INC.,

Petitioners,

v.

B.F. GOODRICH CO., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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June 9, 1998

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QUESTION PRESENTED

Whether federal common law overrides state corporation law limitations on the imposition of successor liability on asset purchasers in cases under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq.*

RULE 29.6 STATEMENT

Petitioners Zollo Drum Company, Inc. and NRS Carting Company, Inc. have no parent companies or subsidiaries.

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ARGUMENT

The Petition for Writ of Certiorari in this case has been held pending the disposition of *United States v. Bestfoods, et al.*, No. 97-454, decided on June 8, 1998. The present Petition is scheduled for consideration at the Court's June 11, 1998 conference.[1]

[1] Because of the short time available, this Supplemental Brief was originally filed on June 9, 1998 in typewritten form.

The Petition for Writ of Certiorari in this case should be granted, since *Bestfoods* expressly reserves the important question this case presents, whether state law or federal common law controls corporate successor liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601 *et seq. Bestfoods* does recognize "[t]here is significant disagreement among courts" concerning the related question whether state law or federal common law governs piercing the corporate veil under CERCLA, but does not decide the issue, as it was not properly presented. ___ U.S. ___, ___ n. 9. The question whether state law or federal common law governs the CERCLA liabilities of business organizations and their owners arises in several closely-related contexts. Language in *Bestfoods* suggests that CERCLA provides no basis for displacing established state corporate law, but *Bestfoods* does not itself resolve this issue, which has badly divided the courts of appeals. Granting this Petition would permit the Court to resolve this important and recurring issue once and for all.

The conflict among the circuits concerning whether it is proper to create federal common law under CERCLA to displace state law of successor liability has deepened since the filing of the Petition in July 1997. At this writing, the First, Sixth and Ninth Circuits have held that state law governs successor liability issues under CERCLA, while the Second, Third, and Fourth Circuits have held that the issue is governed by federal common law.[2]

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[2] *Compare Atchison, T. & S.F. Ry. Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295 (9th Cir. 1997) (state law, not federal common law,

The question whether state law or federal common law governs successor liability issues under CERCLA is controlling in this case. The District Court granted Petitioners' motions for summary judgment under Connecticut law (Pet. App. 79a, 82a); the Second Circuit held that further factual development was necessary, but only to resolve the successor liability issue under the federal common law standard the appellate court created. Pet. App. 22a. Thus, a decision not to create federal common law would finally resolve this case.

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governs successor liability issues under CERCLA; overruling prior decision relied upon by court below); *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994) (same); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991) (same); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993) (applying state law to decide CERCLA successor liability issue), *with* decision below, 99 F.3d 505, 112 F.3d 88 (creating federal common law); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992) (same); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988) (same), *cert. denied*, 488 U.S. 1029 (1989). Three other courts of appeals have applied state law to related issues. *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501-02 (11th Cir. 1996) (state law governs CERCLA liability of limited partners); *Citizens Elec. Corp. v. Bituminous Fire & Cas. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995) (Easterbrook, J.) (applying state law to decide capacity of dissolved corporation to sue or be sued under CERCLA); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990) (applying state law to determine derivative CERCLA liability of parent corporation for actions of subsidiary), *cert. denied*, 498 U.S. 1108 (1991).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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